

MICROCARD

TRADE MARK 

22



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

220

38-99



Due service of the within Supplemental Brief
is hereby acknowledged this.....day of Septem-
ber, A. D. 1938.

Attorneys for Respondents.

FILE COPY

SEP 10 1938

CHARLES ELMORE CO.
9 LE

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE
DICKINSON and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of
the State of California, THE PACIFIC MUTUAL LIFE
INSURANCE COMPANY OF CALIFORNIA, a corporation,
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a
corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

Suggestion of a Diminution of Record and Motion for
Writ of Certiorari; Notice; Affidavit; and Points
and Authorities.

T. B. COSGROVE,

JOHN N. CRAMER,

1031 Rowan Building,
Los Angeles, California.

*Counsel for Respondents Carroll C. Day, Harry C.
Fabling, Joseph M. Gantz, Jack Paschall and
Ralph J. Wetzel.*

SUBJECT INDEX.

	PAGE
Notice of Suggestion of a Diminution of Record and Motion for Writ of Certiorari.....	1
Suggestion of a Diminution of Record and Motion for Writ of Certiorari	3
Affidavit of John N. Cramer in Support of Suggestion of a Diminution of Record and Motion for Writ of Certiorari.....	9
Points and Authorities.....	13

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Ballard v. Searls, 130 U. S. 50.....	13
Butler v. Eaton, 141 U. S. 240.....	13
City of Los Angeles v. Abbott, 217 Cal. 184.....	13
Criscuolo v. Atlas Imperial Diesel Engine Co., 84 Fed. (2d) 273	14
National Fire Ins. Co. v. Thompson, 281 U. S. 331.....	14
Sewell v. Johnson, 165 Cal. 762.....	13
Rules of the Supreme Court of the United States, Rule 17.....	14

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1938

No. 21

W.M. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE
DICKINSON and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of
the State of California, *et al.*,

Respondents.

**Notice of Suggestion of a Diminution of Record and
Motion for Writ of Certiorari.**

*To Petitioners Wm. H. Neblett, Vernon Bettin, William
George Dickinson and Alfred F. MacDonald, and*

*To Wm. H. Neblett, Esq., and R. Dean Warner, Esq.,
Counsel for said Petitioners:*

You and each of you are hereby notified that on Monday, the 3rd day of October, 1938, at the hour of 12:00 o'clock noon of said day or as soon thereafter as counsel may be heard, in the court room of the Supreme Court of the United States in the District of Columbia, the respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel will present to said

court the within Suggestion of a Diminution of Record and Motion for Writ of Certiorari and will then and there move said court to direct the issuance of a writ of certiorari to the Supreme Court of the State of California directing and commanding said court to certify the within described Supplement to Transcript of Record in the above entitled appeal, at which time and place you may be present and heard if you so desire.

Said motion will be presented on said Suggestion of a Diminution of Record and Motion for Writ of Certiorari, said Supplement to Transcript of Record and the affidavit and the points and authorities attached hereto (printed copies of which are herewith served upon you) and upon the Transcript of Record herein, the Petition for Writ of Certiorari and the briefs on file herein.

Dated: September 3, 1938.

T. B. COSGROVE,

JOHN N. CRAMER,

*Counsel for Respondents Carroll C. Day;
Harry C. Fabling, Joseph M. Gantz,
Jack Paschall and Ralph J. Wetzel.*

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE
DICKINSON and ALFRED F. MACDONALD,

Petitioners;

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of
the State of California, *et al.*,

Respondents.

Suggestion of a Diminution of Record and Motion for
Writ of Certiorari.

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Respondents Carroil C. Day, Harry C. Fabling, Joseph
M. Gantz, Jack Paschall and Ralph J. Wetzal, for the
purpose of correcting defects in the Transcript of Record
filed herein April 2, 1938, suggest that said record is in-
complete and that there is a diminution of the record in
the following particulars:

On December 4, 1936, in a certain action then pending
in the Superior Court of the State of California, in and

for the County of Los Angeles entitled, "Samuel L. Carpenter, Jr. v. The Pacific Mutual Life Insurance Company of California, *et al.*", said court made its ORDER APPROVING REHABILITATION AND REINSURANCE AGREEMENT. From said order petitioners herein perfected an appeal to the Supreme Court of the State of California where, on December 7, 1937, judgment was rendered affirming said ORDER. The record upon such appeal is now presented to this court for review upon Writ of Certiorari granted May 16, 1938.

On February 2, 1937, in said action entitled, "*Carpenter v. The Pacific Mutual Life Insurance Company, et al.*", said Superior Court of Los Angeles County upon petition made its ORDER FOR LIQUIDATION appointing said Samuel L. Carpenter, Jr., liquidator. Thereupon petitioners herein, and each of them, prosecuted an appeal from said ORDER FOR LIQUIDATION to said Supreme Court of California and in perfecting said appeal filed with said state Supreme Court three Transcripts on Appeal. Such appeals were numbered L. A. No. 16221, L. A. No. 16245 and L. A. No. 16246, respectively, in the files of said state Supreme Court. Said Transcripts on Appeal from said ORDER FOR LIQUIDATION were on file with the Clerk of said state Supreme Court at the time of the submission of the appeal and at the time of the rendition of judgment in the appeal prosecuted by the petitioners from the ORDER APPROVING REHABILITATION AND REINSURANCE AGREEMENT of December 4, 1936.

The ORDER FOR LIQUIDATION appointing said Samuel L. Carpenter, Jr. liquidator of said The Pacific Mutual Life Insurance Company of California is a matter intimately connected with said ORDER APPROVING REHABILITATION AND REINSURANCE AGREEMENT of said The Pacific Mutual Life Insurance Company of California. Both

of said orders were made and entered in the same case and by the same court and department thereof.

A certified copy of each of said Transcripts on Appeal from said ORDER FOR LIQUIDATION numbered L. A. No. 16221, L. A. No. 16245 and L. A. No. 16246, respectively, are submitted herewith as a Supplement to Transcript of Record in this proceeding.

For the following reasons it is essential to a proper consideration of the questions presented upon certiorari that this court have before it said Supplement to Transcript of Record herein:

1. In their Petition for Writ of Certiorari, petitioners declared:

"It appears that no process of law was accorded one who dissented. He had no place to go. His policy was lost, because the court provided no liquidator with whom he could file his claim. The holding is probably not in accord with applicable decisions of this court herein cited, and the question is one of importance, not heretofore determined by this court."

(Pet. for Cert. p. 17.)

In their brief in support of the petition, petitioners contend:

"Having impaired the contracts of the policyholders in this manner, the plan left any policyholder who did not assent to the plan without right to file his claim with the liquidator of the old company. There was never any liquidator, consequently all of the policyholders were forced to assent to the plan, or be left with absolutely nothing. There could be no greater case of impairment of the obligation of contracts, or a denial of the equal protection of the law. The policyholders had to assent, or see their policies

lost. The court, in approving the plan, made no provision whatever for non-consenting policyholders. Giving to the policyholders who failed to assent to the plan, the right to file their claims with the non-existent liquidator was the deprivation of every due process and an impairment of contract."

(Pet. for Cert. p. 56.)

It appears from said Supplement to Transcript of Record that on February 2, 1937, said Superior Court made its ORDER FOR LIQUIDATION appointing said Samuel L. Carpenter, Jr., liquidator of said The Pacific Mutual Life Insurance Company of California, and that the petitioners and each one thereof filed notice of appeal from said order and perfected said appeal by filing in said state Supreme Court said Transcripts on Appeal hereinbefore identified and incorporated in said Supplement to Transcript of Record.

The petitioners in their appeal to the Supreme Court of the State of California did not raise the point that an order for liquidation had not been made and that said Samuel L. Carpenter, Jr. had not been appointed liquidator. This point is raised for the first time in the Petition for Writ of Certiorari to this court and in the brief in support thereof.

2. Again in their Petition for Certiorari and Brief in Support Thereof, petitioners contend that the only transfer of assets made by respondent Samuel L. Carpenter, Jr., as conservator and/or liquidator, to Pacific Mutual Life Insurance Company was by deed and bill of sale dated July 22, 1936 (Pet. for Cert. pp. 8, 9, 13, and 37).

However, it appears from said Supplement to Transcript of Record that subsequent to December 4, 1936,

and prior to January 7, 1937, respondent Carpenter, pursuant to said Agreement of Rehabilitation and Reinsurance and said Order of December 4, 1936, approving said agreement, transferred to said Pacific Mutual Life Insurance Company all the properties and assets of respondent corporation, The Pacific Mutual Life Insurance Company of California, excepting, however, certain claims against the directors of said respondent corporation and the capital stock of respondent corporation, Pacific Mutual Life Insurance Company.

3. In considering, passing upon and rendering judgment in an appeal the Supreme Court of California takes judicial notice of its records in an intimately connected case and of the facts made to appear by such records, and the facts above recited appearing in said Transcripts on Appeal, to-wit: L. A. No. 16221; L. A. No. 16245 and L. A. No. 16246, contained in said Supplement to Transcript of Record, are matters of which the Supreme Court of California takes judicial notice.

WHEREFORE, the respondents hereinabove named respectfully pray for a writ of certiorari to be directed to the Supreme Court of the State of California commanding that court to certify to this court as a part of the record in this case the Transcripts on Appeal in L. A. No. 16221—Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Wm. H. Neblett, Appellant and Respondent; L. A. No. 16245—Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Alfred F. MacDonald, Appellant and Respondent, and L. A. No. 16246—Samuel L. Carpenter, Jr., Insurance Commissioner of the State

T. B. COBURN,
JOHN N. CRAMER,

*Counsel for Respondents Carroll C. Day,
Harry C. Fabling, Joseph M. Gantz, Jack
Paschall and Ralph J. Wetzel.*

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

I, T. B. Cosgrove, counsel for respondents Carrol C. Day *et al.*, in the above entitled cause, do solemnly swear that the facts recited in the foregoing Suggestion and Motion are true, except such facts as are alleged upon information and belief and, as to those facts that I believe them to be true.

T. B. COVGROVE,
Counsel for Carroll C. Day, et al.

Subscribed and sworn to before me this 3rd day of
September, 1938.

(Seal)

MARY IVES' ANDERSON,
Notary Public in and for the County of Los
Angeles, State of California.

— 9 —

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE
DICKINSON and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of
the State of California, *et al.*,

Respondents.

Affidavit of John N. Cramer in Support of Suggestion
of a Diminution of Record and Motion for Writ
of Certiorari.

STATE OF CALIFORNIA,)

) ss.

COUNTY OF LOS ANGELES.)

JOHN N. CRAMER, being first duly sworn, deposes and
says:

Affiant is one of counsel of record for respondents
Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack
Paschall and Ralph J. Wetzel.

Affiant has examined the files of the Superior Court of
Los Angeles County in the office of the Clerk thereof at

Los Angeles, California, in that certain proceeding therein entitled, "Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner v. The Pacific Mutual Life Insurance Company of California, *et al.*, Respondents", and numbered 404673 in the files of said Superior Court, in which proceeding an order entitled ORDER APPROVING REHABILITATION AND REINSURANCE AGREEMENT was made December 4, 1936, which order was affirmed by the Supreme Court of California on December 7, 1937, and is here under review upon certiorari.

It appears from said files in said Superior Court that on February 2, 1937, said Superior Court (the Honorable Henry M. Willis, Judge presiding) gave its order entitled ORDER FOR LIQUIDATION, wherein it appointed said Samuel L. Carpenter, Jr., liquidator of respondent herein The Pacific Mutual Life Insurance Company of California. It further appears from said original records that the petitioners herein, on the dates hereinafter set forth, filed their respective notices (or amended notice) of appeal to the Supreme Court of the State of California from said ORDER FOR LIQUIDATION made by said Superior Court on February 2, 1937, to-wit:

<u>Name of Petitioner Herein</u>	<u>Date of Filing Notice of Appeal</u>
Wm. H. Neblett	February 5, 1937
Vernon Bettin and	
William George Dickinson	February 25, 1937
Alfred F. MacDonald	February 26, 1937
(Amended Notice of Appeal)	

Affiant has examined the original Transcripts on Appeal filed in the office of the Clerk of the Supreme Court of the State of California in petitioners' said appeals, which are numbered and entitled as follows: L. A. No. 16221—Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Wm. H. Neblett, Appellant and Respondent; L. A. No. 16245—Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Alfred F. MacDonald, Appellant and Respondent, and L. A. No. 16246—Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Vernon Bettin and William George Dickinson, Appellants and Respondents. It appears from said original Transcripts on Appeal that the same were filed with the Clerk of said Supreme Court as follows:

<u>Number of Cause</u>	<u>Name of Appellant</u>	<u>Date of Filing</u>
L. A. No. 16221	Wm. H. Neblett	February 16, 1937
L. A. No. 16245	Alfred F. MacDonald	March 3, 1937
L. A. No. 16246	Vernon Bettin and William George Dickinson	March 3, 1937

A true copy of each of said Transcripts on Appeal (omitting, however, endorsements and affidavits of service on each transcript, but including endorsements of filing) is contained in the Supplement to Transcript of Record submitted with, and referred to, in the foregoing Suggestion of a Diminution of Record and Motion for Writ of Certiorari.

JOHN N. CRAMER,

Subscribed and sworn to before me this 3rd day of September, 1938.

(Seal)

MARY IVES ANDERSON,
*Notary Public in and for the County of
Los Angeles, State of California:*

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE
DICKINSON and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of
the State of California, *et al.*,

Respondents.

Points and Authorities.

The Supreme Court of California takes judicial notice of matters appearing in its files in intimately connected cases, particularly where such matters occurred after the order or judgment under review.

Sewell v. Johnson, 165 Cal. 762, 770-775;

City of Los Angeles v. Abboitt, 217 Cal. 184, 192.

The Supreme Court of California in this regard follows decisions of the Supreme Court of the United States to the same effect.

Ballard v. Searls, 130 U. S. 50;

Butler v. Eaton, 141 U. S. 240, 242.

And see:

National Fire Ins. Co. v. Thompson, 281 U. S.
331, 336, and cases cited.

This cause being before this court on writ of certiorari to the Supreme Court of California, this court will take judicial notice of all matters of which the Supreme Court of California takes judicial notice.

Criscuolo v. Atlas Imperial Diesel Engine Co., 84
F. (2d) 273, 275.

The suggestion of a diminution of record and motion for certiorari is the proper method to bring these matters to the attention of this court.

Rule 17, Rules of the Supreme Court of the United States.

Respectfully submitted,

T. B. COSGROVE,

JOHN N. CRAMER,

*Counsel for Respondents Carroll C. Day, Harry C.
Fabling, Joseph M. Gantz, Jack Paschall and
Ralph J. Wetzel.*

